Supreme Court, U.S.
FILED
7 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 803

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Appellant,

vs.

THE CITY OF MESA, ARIZONA

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Appellee, City of Mesa, moves to dismiss or affirm the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that no substantial Federal question is presented.

Question Presented

Is a political subdivision of a State deprived of equal protection of the law under the Constitution of the United States when the State Supreme Court interprets State law as providing that another subdivision of the same State has the authority to furnish electric energy to consumers in a certain area?

Statement of the Case

This appeal is from a unanimous opinion of the Supreme Court of Arizona, En Banc, in a declaratory judgment action brought pursuant to Arizona Law, Arizona Revised Statutes Annotated, 1956, Title 12, Ch. 10 (hereinafter cited A.R.S.) to determine which political subdivision of the state has the right to serve electrical energy to consumers in areas within and adjacent to the City of Mesa. The action was brought by the City of Mesa against the Salt River Project Agricultural Improvement and Power District (hereinafter called the District).

The City of Mesa is a political subdivision of the State of Arizona. The District was organized and exists pursuant to Arizona Law, A.R.S., Title 45, Ch. 4, for the purpose of reclaiming lands susceptible of irrigation. The District is a political subdivision of the State of Arizona, Arizona Constitution, Art. 13, Sec. 7, and a municipal corporation to the extent of the powers granted to it.[1] (A.R.S. §45-902).

The predecessor of the District was the Salt River Valley Water Users' Association, (hereinafter referred to as the Association,) which was incorporated in 1903 under the General Corporation Laws of the Territory of Arizona for the purpose of furnishing water, irrigation, power and drainage to lands of members. It was authorized to contract with the United States for the construction and operation of dams, power plants, transmission lines, canals, and other facilities incident to the storage, production, distribution and operation of irrigation, water, power and drainage works for the benefit of the lands described in its articles

[1] See also *Local 266, Etc.* v. *Salt River Project Agr. Imp. and P. Dist.*, 78 Ariz. 30, 275 P. 2d 393 (1954)—while irrigation districts are subdivisions of the state in some senses, their function is purely business and economic, rather than political or governmental.

of incorporation and within the boundaries of the Association. (R. 7.) [2]

The Association entered into a contract with the United States in 1904 (P. 39a) whereby the United States undertook construction of irrigation works along the Salt River conditioned upon appropriate payments by the Association (P. 42a). A 1917 contract (P. 47a) provided for the transfer of the care, operation and maintenance of the irrigation works to the Association and the payments by the Association to the United States for the construction of the project. (P. 50a).

In 1928 the Association amended its Articles of Incorporation to authorize, and, by agreement with its shareholders, began to provide electric service to lands and people within a part of the Salt River Valley. Since 1928 the Association, or the District, has also constructed an additional hydroelectric plant, additional steam generating plants, transmission lines and additions to the distribution system at a cost in excess of Forty-five Million Dollars ($45,000,000.00) (R. 81, 82). Funds for this program were provided by the issuance of bonds.

In 1937 the Association transferred and assigned all its properties and rights to the District (P. 58a). Up until this transfer, property and bonds of the Association were subject to local, state and Federal taxes. The purpose of this transfer was to secure "exemption of the property and bonds of the Association from local, state and Federal taxes". (P. 62a). By transferring the property and bonds to the District, a municipal corporation, the exemption occurred with the adoption of a constitutional amendment. Ariz. Const., Art. 13 § 7. The Association continued, how-

[2] References to pages of the Abstract of Record filed with the Supreme Court of Arizona and certified to this Court are indicated by "(R.)". References to the Jurisdictional Statement are indicated by "(P.)".

ever, to operate and maintain all of the works and facilities until 1949 at which time the District took over the maintenance and operation of the electric power system. (P. 2a). The Association continues to operate all facilities other than those for the production, sale and distribution of electrical energy.

From time to time since 1917 when the City of Mesa began furnishing utilities to its residents, it entered into contracts to purchase wholesale power from the Association and in connection with such agreements entered into certain territorial agreements. However, since 1949 there has been no agreement or contract, entered into or in force, between the City of Mesa, the Association or the District for purposes of reserving to either the territory of electrical service. *City of Mesa* v. *Salt River Project, Agr. Imp. & P. Dist.*, 92 Ariz. 91 373 P. 2d 722, 726 (1962) (P. 3a, 12).

The tremendous growth of the area subsequent to World War II necessitated the expansion by means of annexation of the incorporated limits of the City and expansion of the facilities and services of the District. As a result, the District is now serving customers within the City, and using City streets and other public ways for the purpose.

Under Arizona law any person desiring to subdivide any area within 3 miles of an incorporated city must secure approval by the City of his proposed plat (A.R.S. § 9-474). This statutory requirement and the maps in the record (R. 101-102) make it crystal clear that the disputed service area has not been served by the District for any great length of time. In fact, most of the service connections of the District within the city limits of Mesa have been made within the last 3 to 7 years, i.e. from 1600 connections in 1956 to over 6000 now. The majority of the disputed area was farm land until annexed by the City of Mesa and much of it still is uninhabited.

The City owned utility out of its earnings pays more than two thirds (2/3) of the City's budget for police, fire and all other municipal expenses. (R. 182). The District, on the other hand, pays nothing to the City as its share of such municipal expenses. Yet, the District uses city streets and all the services furnished by the City free.

While in a previous similar dispute,[3] the District sold its facilities within a disputed area to the City, the parti are now unable to arrive at a settlement and thus the declaratory judgment action was brought. The City has always objected to the District extending its facilities within the City's corporate limits. (R. 11-13, 49). And the City is now and always has been ready and willing to pay to the District the full value of these District facilities (Brief of Appellant in Ariz. Sup. Ct., p. 75).

The Supreme Court of Arizona, in a comprehensive opinion, decided that:

> (1) The District can be required to terminate its electrical service within the disputed area upon the payment of just compensation for its property rights;
>
> (2) A state statute prohibits the City of Mesa from competing with the District in the disputed area and the City of Mesa may not serve the disputed area unless it first acquires the District's facilities; and
>
> (3) The City of Mesa can acquire by eminent domain the facilities of the District in the area. (P. 1a-18a).

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[3] Randall Heights Area, Brief of Appellant In The Supreme Court Of the State of Arizona, p. 6.

ARGUMENT

No Substantial Federal Question Is Raised By This Appeal

1. *The Fourteenth Amendment Is Not Violated By Provisions Of The Constitution Or Law Of Arizona Relative To Powers Of Political Subdivisions.*

In the absence of Constitutional restrictions (*Williams* v. *Eggleston*, 170 U.S. 304; *Mount Pleasant* v. *Beckwith*, 100 U.S. 514) the legislature has absolute control over the number, nature, duration and extent of powers conferred upon political subdivisions and the territory over which they shall be exercised. *Hunter* v. *Pittsburgh*, 207 U.S. 161. The state may qualify, enlarge, abridge or entirely withdraw at its pleasure the powers of a political subdivision. *Meriwether* v. *Garrett*, 102 U.S. 472; *Laramie County* v. *Albany County*, 92 U.S. 307. This Court has stated "Neither their [municipal corporations] charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution", *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178. *Hunter* v. *Pittsburgh* also holds that the state is supreme as to the powers of its political subdivisions and its legislative body conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. A long line of decisions of this Court reaffirm this principle cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343.

The City is a municipality organized under the general laws of the State of Arizona and the constitutional provisions relating to it are found in Article 13, Arizona Constitution.

The District is an agricultural improvement district organized pursuant to the provisions of what is now Chapter 4, Title 45, Ariz. Rev. Stats. and is a political subdivision of the State of Arizona under Section 7, Article 13, Arizona Constitution. The predecessor in interest to the District, the Association, was incorporated in 1903 under the General Corporation Laws of the Territory of Arizona.

The District has consistently referred to itself and its predecessor as a subdivision of the State of Arizona (P. 58a, 74a, 78a).

In the words of the Supreme Court of Arizona, the District's exact status escapes a simple definition, however, "It is denominated a political subdivision of the state and entitled to all the immunities and benefits granted to municipalities by the Constitution or statutes, Constitution, Art. 13 § 7 [Amendment of 1940]. Yet as a political subdivision its powers are obviously limited to the purposes justifying its political existence. The privileges and immunities granted extend only so far as they have a legitimate relationship to the legal objectives for which the District is organized."[4] (P. 4a).

The Constitution and Statutes of Arizona relevant to the status of the City and of the District and their respective authority to provide electric utility service to the consumers have been interpreted by the Supreme Court of Arizona, En Banc. In a unanimous opinion this Court held that:

(1) The District may not be required by the City to terminate its operations in the annexed area without just compensation;

(2) The right of the City and District to compete in

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[4] See also *Taylor* v. *Roosevelt Irr. Dist.* 72 Ariz. 160, 232 P. 2d 107 (1951) and *Local 266, Etc.* v. *Salt River Project Agr. Imp. and P. Dist.*, supra Note 1.

the disputed localities has been expressly denied by the legislature in its enactment of A.R.S. § 9-516 subd. A; and

(3) The City may acquire the District's facilities by eminent domain.

In so holding the Court stated that the District is a municipal corporation of a peculiar type, its primary function is to provide water for irrigation, and this has not been changed by Art. 13, Sec. 7 of the Constitution; and that in conducting its ordinary business the District is not exercising governmental or political prerogatives as it is not operated for the direct benefit of the general public but, only those landowners who are inhabitants of the District itself.[5]

This construction of the Arizona Constitution and statutes is binding upon this Court. *Jefferson Branch Bank* v. *Skelly*, 1 Black (U. S.) 436, 443; *Morehead* v. *New York*, 298 U. S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

2. *The District Is Not Denied Equal Protection Because The Law Of Arizona Makes A Reasonable Classification Among Political Subdivisions.*

The Equal Protection Clause was not designed to insulate state instrumentalities from state action, and as political subdivisions they do not have privileges or immunities which they may invoke contrary to the will of their creator. "A municipal corporation, created by a state for better ordering of government, has no privileges or immunities

[5] The Court had held in *Taylor* v. *Roosevelt Irr. Dist.*, supra, Note 4, that adoption of the Constitutional amendment in no sense altered the inherent characteristics of the District and that it is essentially a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized.

under the Federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Baltimore*, 289 U. S. 36, 40; see also *Hunter* v. *Pittsburgh*, 207 U. S. 161. As this Court long ago held in *Laramie County* v. *Albany County*, 92 U. S. 307, 311, political subdivisions of a state cannot sustain their privileges or even their existence upon the basis of any contract with the state. Nor do they have any contract rights with the state solely by reason of their relationship to it. *Gomillion* v. *Lightfoot*, 364 U. S. 339, 343. "—[T]he Equal Protection Clause relates to equality between persons as such, rather than between areas." *McGowan* v. *Maryland*, 366 U. S. 420, 427.

That there is a distinction between the District and the City is amply demonstrated by the decision of the Arizona Supreme Court.[6] In addition, Mesa has a right given by the Arizona Constitution to engage in the electric utility business while the District has not.[7] The City can grant a franchise for a public utility to serve electrical energy. The District cannot. Hence, Mesa has a constitutional right to engage in this business; the District has not.

It has long been settled that a classification, even though discriminatory, is not arbitrary or violative of the Equal Protection Clause if any state of facts reasonably can be conceived that would sustain it. *Allied Stores* v. *Bowers*, 358 U. S. 522, 528.

The Arizona Supreme Court has considered the classification of the powers of the City and of the District to be valid. 92 Ariz. 91, 373 P. 2d 722 (1962). The record on this

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[6] See Jurisdictional Statement 13a; see also *Taylor* v. *Roosevelt Irr. Dist.*, supra, Note 4, and *Local 266, Etc.* v. *Salt River Project Agr. Imp. and P. Dist.*, supra, Note 1.

[7] Art. 13, Sec. 5 of the Arizona Constitution reads: "Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm or corporation by virtue of a franchise from said municipal corporation."

case wholly fails to support any claim that the classification so fixed infringes the Equal Protection Clause.

3. *Questions Presented For The First Time In This Court Are Raised Too Late*

In stating the Question it says it presents in its Jurisdictional Statement, Appellant for the first time in this litigation describes itself as a "federal reclamation project" in challenging the right of the City to take its electrical service facilities which are located within the city's corporate limits. This "federal reclamation project" description was not mentioned by Appellant in any Court below, was not listed in the Notice of Appeal and is obviously an afterthought which is totally without merit.

No federal money has ever been spent on the District's electrical power facilities to serve private homes and businesses within the corporate limits of the City of Mesa, which facilities are the disputed facilities herein. (R. 81, 82, 84, 109). No federal action or interest has ever been directed at these facilities. The federal government has had absolutely nothing to do with these facilities. The reclamation part of the project and the sale and delivery of electrical energy have been operated as separate projects since 1949 (P. 2a, 58a). The Appellant's attempt at this late stage of this case to dream up a "Federal angle" and interest is so novel as to be a sham. So palpably a "last gasp" at something new never even mentioned in the courts below is so lacking in legal value as to be totally without substance. Yet most of the Jurisdictional Statement is devoted to alleged errors based on Appellant's alleged federal reclamation status, a claim which this Court in a long line of decisions has repeatedly held it will not consider because it is raised for the first time in this Court.

This Court long ago declared that it is too late when

new matters are raised for the first time in this Court saying:

"It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration." *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700; see also *Edelman* v. *California*, 344 U.S. 357; *Hiawassee River P. Co.* v. *Carolina-Tennessee P. Co.*, 252 U.S. 341.

It is interesting to note that Paragraph V of the District's Amended Counterclaim, (R. 84), alleged without qualification that the facilities here in question are owned outright by the District and no mention is made of any interest on the part of the United States.[8] The facilities in question are a part of those constructed by the District with its own funds or the funds of its predecessor and no Federal Government funds of any nature are involved therein.

Under the Reclamation Law, the United States reserved the right to take over and manage any reclamation project if it ceases to successfully function as a reclamation project. This eventuality is not involved here and since the original contracts of the United States and the Association (P. 39a) the entirely different functions of the operation of the reclamation project for the purpose of furnishing irrigation water to arid lands and the sale of surplus electricity as an enterprise of the District for the sole purpose of reducing the cost of water and power to its shareholders have been separated. It is interesting that in its complaint

[8] The precise question of ownership was also asked and similarly answered by the District in answer to Interrogatories of the City. R. 109; see also Findings of Fact VII of the Arizona Superior Court, R. 23a.

the City alleged that the statutes pertaining to condemnation did not provide Mesa with the right to condemn the facilities of the District. (P. 34). In its answer, the District denied that this was so, admitting directly that Mesa did have the right to condemn its facilities. (P. 53).

Nothing in the cases of *Ivanhoe Irrigation District* v. *McCracken*,[9] *United States* v. *San Francisco*,[10] *Federal Power Commission* v. *Idaho Power Co.*,[11] *New York Trust Co.* v. *Farmers Irrigation District*,[12] *Nebraska* v. *Wyoming*,[13] *Oklahoma* v. *Guy F. Atkinson Co.*,[14] *United States* v. *Rio Grande Dam and Irrigation Co.*,[15] *Arizona* v. *California*,[16] and *United States* v. *Carmack*,[17] cited by Appellant warrants a conclusion that the United States has or could possibly claim an interest in the District's property here in question.

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[9] 357 U.S. 275—Federal law is applied in determining validity of contracts between the United States, State of California and others under § 8 of Reclamation Act of 1902.

[10] 310 U.S. 16—Injunction to prevent San Francisco from selling water through a private utility.

[11] 344 U.S. 17—F.P.C. had authority to attach a condition to a grant.

[12] 280 Fed. 785 (8th Cir. 1922)—Secretary of Interior lacked authority to voluntarily take over Irrigation District until indebtedness was paid.

[13] 325 U.S. 589—Priority of water rights in the North Platte River.

[14] 313 U.S. 508—U.S. has superior power of eminent domain, but does not deal with a state condemning a power distribution system.

[15] 174 U.S. 690—Congress recognized and assented to appropriation of water in contravention of common law rules but not to destroy navigability of rivers.

[16] 298 U.S. 558—Appropriation rights on the Colorado River, no federal reclamation project involved.

[17] 329 U.S. 230—U.S. had power to condemn lands owned by the State for a Post Office.

Conclusion

For the reasons given above, the appeal should be dismissed or the decision of the Arizona Supreme Court should be affirmed as no substantial federal question is presented herein.

Respectfully submitted,

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